No. 87-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BRENDA PATTERSON,

Petitioner,

—v.—

McLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE NORTH CAROLINA CIVIL LIBERTIES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1/]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members dedicated to preserving and advancing the fundamental civil rights and civil liberties of the people of the United States. The North Carolina Civil Liberties Union Legal Foundation, with more than 3,500 members, is one of its national chapters.

Central among the fundamental rights and liberties of our society is the right to be free from racial discrimination. The ACLU has been involved in numerous cases before this Court and other tribunals

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1/ The parties have consented to the filing of this brief, as indicated by their letters of consent filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

involving issues related to the achievement of the fundamental right of equality, and to the advancement of antidiscrimination principles.

This case raises important issues concerning the protection afforded and the remedies available to victims of racial discrimination in employment. The significance of this case to the achievement of equal employment opportunity has prompted the ACLU to file this brief amicus curiae in support of petitioner.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is the position of amici that claims of racial harassment in the workplace are cognizable under 42 U.S.C. §1981 ("Section 1981") as well as under Title VII of the Civil Rights Act of 1964. The court of appeals' holding to the

contrary in this case erroneously narrows the range of legal relief available to victims of racial harassment in the workplace and eviscerates the legal protections which Congress intended to extend to such victims.

The history surrounding the enactment of the Civil Rights Act of 1866 supports the conclusion that Congress intended to create an expansive remedy for victims of race discrimination. In light of the legislative history accompanying its enactment, §1981 is appropriately applied to combat racial harassment in the workplace today. As this Court has repeatedly recognized, the legislative history supports a liberal construction of the provisions of the Act. Section 1981, as interpreted by this Court, clearly encompasses allegations that an employer

has targeted a black employee for disparate, hostile treatment and has engaged in a campaign of harassment solely on account of that employee's race. The acts alleged by the petitioner in pleadings and argument below[2/] certainly interfered with petitioner's ability to fulfill her employment contract, and deprived her of an opportunity to work in an atmosphere free of racially motivated hostility and harassment. The alleged acts undoubtedly frustrate a black employee's exercise of the rights declared in §1981.

The right to "make and enforce" contracts in a manner identical to that enjoyed by whites becomes meaningless if the court of appeals' decision that the

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2/ See Joint Appendix at 7-9; Petitioner's Appendix to the Petition for a Writ of Certiorari at 3a-5a.

right excludes the enjoyment of a workplace free of racial harassment is allowed to stand. The decision below is inconsistent with the express intent of Congress in enacting the predecessor to the modern §1981, and conflicts with the decision of this Court and the lower federal courts. Accordingly, the decision should be vacated.

Section 1981 is an important independent means of redressing racially motivated employment discrimination. The relief available under §1981 to victims of employment discrimination is particularly appropriate relief in racial harassment cases. Amici submit that it is important to preserve the remedies available under 42 U.S.C. §1981, particularly compensatory and punitive damages, in cases of racial harassment in the workplace.

ARGUMENT

I. THE LEGISLATIVE HISTORY SURROUNDING THE ENACTMENT OF 42 U.S.C. §1981 MANIFESTS CONGRESSIONAL INTENT THAT THE ACT BE CONSTRUED LIBERALLY

Section 1981 prohibits racial discrimination in the making and enforcement of private contracts. Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975); Runyon v. McCrary, 427 U.S. 160, 168 (1976); McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 295 (1976); Goodman v. Lukens Steel Co., 482 U.S. ___, 96 L.Ed.2d 572, 582 (1987).1/

1/ 42 U.S.C. §1981 provides in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(continued...)

This Court has reviewed the legislative history of the Civil Rights Act of 1866 on several occasions and has concluded that the Civil Rights Act was intended as a broad prohibition against racial discrimination, and that it is consistent with the legislative intent to read the statute liberally. See e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409

1/ (...continued)

42 U.S.C. §1981 was derived from §1 of the 1866 Civil Rights Act, 14 Stat. 27, which was re-enacted with minor changes as §16 of the Civil Rights Act of 1870, 16 Stat. 144. See Runyon v. McCrary, 427 U.S. 160, 168-70 and n.8; see also Jones v. Alfred H. Mayer Co., 392 U.S. 409, 421 (1968).

(1968);[4] McDonald v. Santa Fe Trail Trans. Co., 427 U.S. 273 (1976).[5]

Congress enacted the Civil Rights Act of 1866 in response to post-Emancipation legal and extra-legal efforts to oppress the freedmen, and intended the legislation to "'give effect to th[e Thirteenth Amendment] and secure to all persons within the United States practical freedom.'"[6]

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[4] "'We think that history leaves no doubt that, if we are to give [the law] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" 392 U.S. 409, 437 (1968)(quoting United States v. Price, 383 U.S. 787, 801 (1966)).

[5] "[T]he Act was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." 427 U.S. 273, 295.

[6] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 431 (1968)(quoting Cong. Globe, 39th Cong., 1st Sess. at 474)(Remarks of Senator Trumbull). See generally Comment, "Developments in the Law - Section 1981," 15 Harv.C.R.-C.L.L.Rev. 33, 35-48 (1980).

In his comprehensive review of the legislative history of the 1866 Civil Rights Act in the majority opinion in Jones, supra, Justice Stewart wrote:

> That the bill would indeed have . . . [a sweeping] effect was seen as its great virtue by its friends and as its great danger by its enemies but was disputed by none . . . . Thus, when the Senate passed the Civil Rights Act . . . it did so fully aware of the breadth of the measure it had approved . . . . [W]hen the House passed the Civil Rights Act . . . it did so on the same assumption that had prevailed in the Senate: It too believed that it was approving a comprehensive statute forbidding all racial discrimination affecting the basic civil rights enumerated in the Act
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> . . . .
>
> In light of the concerns that led Congress to adopt it and the contents of the debates that preceded its passage, it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein.

Jones v. Alfred H. Mayer Co., 392 U.S. 409, 433, 435-36 (1968).

The Civil Rights Act of 1866 was drafted and introduced by Senator Trumbull shortly after the ratification of the Thirteenth Amendment to the Constitution.[7] Senator Trumbull stated that his proposed bill was intended to provide a "means" of "carr[ying] into effect" the "declaration" of the Thirteenth Amendment,[8] and would "break down all discrimination between black men and white men."[9] In the House of Representatives another proponent of the

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[7] See Jones v. Alfred H. Mayer Co., 392 U.S. at 429-32.

The Thirteenth Amendment to the Constitution provides that "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. Const., Amendment 13, §1 (1865). Section 2 of the Amendment authorizes congressional enforcement of the amendment by appropriate legislation.

[8] Cong. Globe, 39th Cong., 1st Sess. 474 (1866).

[9] Cong. Globe, 39th Cong., 1st Sess. at 599.

Act, Representative Cook of Illinois, expressed particular concern about eradicating interference with the labor contracts of black workers. Representative Cook advanced the proposed Civil Rights Act as an antidote to interference with the employment rights of the freedmen:

> [I]f it is competent for the . . . Legislatures of the rebel States to enact . . . laws which impair their [the freedmen's] ability to make contracts for labor in such a manner as virtually to deprive them of the power of making such contracts . . . then . . . of what practical value is the amendment abolishing slavery in the United States?[10]

Against this background, Congress enacted the Civil Rights Act of 1866 to correct a myriad of perceived evils. The legislation was intended to prohibit the various manifestations of racial

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[10] Cong. Globe, 39th Cong., 1st Sess. 1151 (1866).

discrimination which emerged during the post-Emancipation period. As this Court observed in Jones v. Alfred H. Mayer Co.:

> [Section] 1 of the Civil Rights Act of 1866 . . . . was cast in sweeping terms:
>
> [A]ll persons born in the United States and not subject to any foreign power [. . .] are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or servitude [. . .] shall have the same right, in every State and Territory of the United States, to make and enforce contracts [. . .] as is enjoyed by white citizens

392 U.S. 409, 422-23 (1968).

It is well settled that Congress intended, in enacting the Civil Rights Act of 1866, from which §1981 was derived, to impose a far-reaching prohibition against racial discrimination in various transactions and relationships including the private employer-employee

relationship.11/ The language of the statute is itself expansive, and was intended to be so by the Thirty-ninth Congress. Accordingly, this Court's decisions have liberally construed the statute. In light of the breadth of this legislation as drafted by Congress and construed by this Court, the restriction of its force and effect embodied in the decision below in this case is contrary to the legislative intent and should be rejected by this Court.

11/ In Johnson v. Railway Express Agency, 421 U.S. 454 (1975), this Court confirmed that §1981 is "a remedy against private employment discrimination separate from and independent of . . . Title VII [of the Civil Rights Act of 1964]." 421 U.S. 454, 466. Compare 42 U.S.C. §1981 (§1 of the Civil Rights Act of 1866, reenacted as §16 of the Civil Rights Act of 1870) with 42 U.S.C. §§2000e et seq. (Title VII of the Civil Rights Act of 1964). See also Runyon v. McCrary, 427 U.S. 160, 179 (1976)(noting that U.S.C. §1981 "eliminate[d] . . . racial discrimination in the making of private employment contracts.")

II. 42 U.S.C. §1981 PROVIDES IMPORTANT INDEPENDENT REMEDIES FOR VICTIMS OF ALL FORMS OF RACIALLY-MOTIVATED EMPLOYMENT DISCRIMINATION INCLUDING RACIAL HARASSMENT IN THE WORKPLACE

A. The Decisions Of This Court Conclusively Establish That 42 U.S.C. §1981 Is An Independent And Distinct Avenue of Relief for Victims of Racially Motivated Employment Discrimination

The decision of this Court in Johnson v. Railway Express Agency, 421 U.S. 454 (1975) conclusively established that 42 U.S.C. §1981 provides a remedy for victims of racially motivated employment discrimination.[12/] In Johnson, this Court addressed the issue of whether the statute of limitations for filing an employment discrimination action pursuant to Section

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12/ "Although this Court has not specifically so held, it is well settled among the Federal Courts of Appeals — and we now join them — that §1981 affords a federal remedy against discrimination in private employment on the basis of race." Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975).

1981 should be tolled during the pendency of administrative procedures required as a prerequisite to the initiation of an action under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000e et seq. The Johnson decision affirmed the holding of the Sixth Circuit Court of Appeals that the timely filing of an employment discrimination charge with the Equal Employment Opportunity Commission, pursuant to Title VII, does not toll the limitation period for filing a Section 1981 action based on the same facts. Johnson v. Railway Express Agency, 421 U.S. 454 (1975).

Justice Blackmun, writing for the majority of the Court, reviewed the legislative history of Title VII and concluded that while Title VII "was enacted 'to assure equality of employment

opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin,'" Congress did not intend to establish Title VII as an exclusive remedy for employment discrimination. Johnson v. Railway Express Agency, 421 U.S. 454, 457, 459 (1975) (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974)). This Court held that the passage of Title VII did not vitiate the remedies available to victims of racially motivated employment discrimination under other federal laws and concluded that "the remedies available under Title VII and under §1981, although related, and although directed to most of the same ends, are separate, distinct, and independent."

Johnson v. Railway Express Agency, 421 U.S. at 461.[11]

This Court has reaffirmed the principle that Section 1981 is an independent and distinct avenue of relief for victims of racially motivated employment discrimination in a number of decisions since Johnson. For example, in Runyon v. McCrary, 427 U.S. 160, 49 L.Ed.2d 415 (1976), a §1981 action challenging the exclusion of non-whites from private schools, the Court noted that "Congress in enacting the Equal Employment Opportunity Act of 1972 . . . specifically considered

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[11] This Court noted several distinctions between §1981 and Title VII remedial provisions. Of particular relevance here, the Court noted that "(a)n individual who establishes a cause of action under §1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances punitive damages . . . . (a)nd a back pay award under §1981 is not restricted to the two years specified for back pay recovery under Title VII." Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975).

and rejected an amendment that would have repealed the Civil Rights Act of 1866 . . . insofar as it affords private-sector employees a right of action based on racial discrimination in employment." 427 U.S. 160, 174. See also Runyon, id., 427 U.S. at 174 n.11. Similarly, this Court's decision last term in Saint Francis College v. Al-Khazraji, 481 U.S. ____, 95 L.Ed.2d 582 (1987) again confirmed that §1981 "forbid[s] all 'racial' discrimination in the making of private as well as public contracts," including employment contracts. 481 U.S. ___, 95 L.Ed.2d 582, 589.14/ Inasmuch as the

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14/ See also McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 288 (1976)(holding in an employment discrimination case that §1981 "prohibit[s] any racial discrimination in the making and enforcement of contracts,"); Goodman v. Lukens Steel Co., 482 U.S. ___, 96 L.Ed.2d 572, 582 (1987)(holding in an employment discrimination case that §1981 "declares the (continued...)

decision below suggests that the availability of a Title VII remedy in racial harassment cases conflicts with availability of §1981 as an avenue of relief in such cases, the decision is clearly erroneous.15/

An uninterrupted line of decisions of this Court beginning with Johnson v.

14/ (...continued)
personal right to make and enforce contracts, a right, as the section has been construed, that may not be interfered with on racial grounds.").

15/ This Court has previously rejected arguments suggesting the exclusivity of Title VII as a remedy for employment discrimination claims. See e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)(Arbitrator's decision not binding in Title VII actions because contractual rights under a collective bargaining agreement and rights under Title VII "have legally independent origins and are equally available to the aggrieved employee."); Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976)(collective bargaining agreement grievance arbitration procedure and Title VII charge may be pursued concurrently, and period for filing charge of discrimination with the Equal Employment Opportunity commission is not tolled during pendency of grievance arbitration procedure).

Railway Express Agency, supra, holds that 42 U.S.C. §1981 establishes an independent remedy for victims of racially motivated employment discrimination. Thus, this Court should reject the decision below, which suggests that the availability of a Title VII remedy somehow undermines petitioner's reliance upon §1981 to obtain relief for racial harassment.

B. This Court Has Recognized The Availability Of Relief Under 42 U.S.C. §1981 In A Variety Of Circumstances Including Racial Harassment In The Workplace

The §1981 employment discrimination cases reviewed by this Court since Johnson have involved varied factual scenarios, and presented different legal and procedural issues, but the decisions of this Court have in no instance questioned the appropriateness of reliance upon §1981

as a remedy for racially motivated employment discrimination.

The court of appeals distinguished between the "terms, conditions, or privileges of employment"[16/] and "§1981's more narrow prohibition of discrimination in the making and enforcing of contracts." Patterson v. McLean Credit Union, 805 F.2d 1143, 1145. The court of appeals' analysis engrafts the novel requirement that the courts assess the facts of a racial discrimination claim and determine whether the acts alleged "go to the very existence and nature of the contract" before allowing the claimant to proceed with a §1981 employment discrimination. There is no support for this analysis of §1981 in this Court's decisions.

16/ See 42 U.S.C. §2000e-2(a).

Johnson v. Railway Express Agency, supra, involved challenges to an employer's discrimination "against its Negro employees with respect to seniority rules and job assignments," and to several labor unions' maintenance of "racially segregated memberships."17/ With these allegations before it, this Court held that dismissal of the §1981 claim as untimely was appropriate. The Johnson opinion is free of any suggestion, however, that the §1981 claim based, inter alia, upon allegations of discriminatory seniority rules and job

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17/ Johnson v. Railway Express Agency, 421 U.S. 454, 455 (1975).

The Court noted, however, that "[t]he claims against the union were dismissed [below] on res judicata grounds . . . . [and t]his issue . . . was not included in [the Court's] grant of certiorari." Johnson, 421 U.S. at 457 n.3. Petitioner Johnson was fired three weeks after he filed his EEOC charge, so he subsequently amended his charge to include an allegation of discriminatory termination. 421 U.S. 454, 455.

assignments was substantively defective. From all that appears in Johnson, the only bar to proceeding with a §1981 claim in the case was procedural rather than substantive.

As noted in the opinion below,18/

18/ The court of appeals wrote:

> The cases relied on by Patterson . . . [do not] directly hold[] that racial harassment gives rise to a discrete claim under §1981 as distinguished from recognizing that racial harassment may be relevant as evidence of discriminatory intent supporting a cognizable claim of employment discrimination under §1981 and that it may give rise to a discrete Title VII claim.

805 F.2d at 1146. The decision then cites the district court opinion in Goodman (reported at 580 F.Supp. 1114) with a parenthetical explanation that the opinion "very generally cit[ed] §1981, along with Title VII, as a basis for a claim of racial harassment." 805 F.2d 1143, 1146. Cf. Goodman v. Lukens Steel Co., 96 L.Ed.2d 572, 584 ("[T]he unions were found to have discriminated on racial grounds in violation of both Title VII and §1981 in certain ways . . . [including their] tacit encouragement of racial harassment.").

Goodman v. Lukens Steel Co., 482 U.S. ___, 96 L.Ed.2d 572 (1987), involved a racial harassment claim. The district court in Goodman found defendants United Steelworkers Union and two local unions "guilty of discriminatory practices . . . [including] tacit[] encourag[ement of] racial harassment." 96 L.Ed.2d 572, 581. See also Goodman v. Lukens Steel Co., 580 F.Supp. 1114 (E.D.Pa. 1984). The Third Circuit "affirmed the liability judgment against the Unions."[19/] This Court noted that the liability of the unions was founded upon "both Title VII and §1981 [violations]," and concluded that "[t]he courts below . . . properly construed and applied Title VII and §1981." Goodman v. Lukens Steel Co., 482 U.S. ___, 96 L.Ed.2d

19/ 96 L.Ed.2d 572, 581. See also Goodman v. Lukens Steel Co., 777 F.2d 113 (3d Cir. 1985).

572, 587 (1987). As in Johnson, supra, this Court's decision in Goodman contrasts starkly with the analysis of the court below. There is, again, no intimation in this Court's Goodman decision that racial harassment or other claims beyond those that "go to the very existence and nature of the contract" as defined in the decision below are cognizable under Title VII but not under §1981. Indeed, this Court's affirmance of the judgment finding the unions liable for racial harassment under both Title VII and §1981 squarely conflicts with the decision below.

The court of appeals' decision in this case confining the application of §1981 to race discrimination claims which "go to the very existence and nature of the employment contract," Patterson v. McLean Credit Union, 805 F.2d 1143, 1145 (4th Cir.

1986) unduly restricts the availability of the §1981 remedy for employment discrimination victims, and is contrary to the decisions of this Court, which have expressly and tacitly approved and applied §1981 in a variety of employment situations.

C. The Remedial Provisions Of 42 U.S.C. §1981 Are An Important Weapon In The Arsenal Of Legal Remedies To Combat Racial Harassment In The Workplace

Justice Marshall, in a separate opinion in Johnson v. Railway Express observed:

> In recognizing that Congress intended to supply aggrieved employees with independent but related avenues of relief under Title VII of the Civil Rights Act of 1964 and §16 of the Civil Rights Act of 1870, 42 U.S.C. §1981, the Court emphasizes the importance of a full arsenal of weapons to combat unlawful employment discrimination in the private as well as the public sector." 421 U.S. 454, 468 (1975)(Marshall, J., concurring in part and dissenting in part).

The decision below effectively eliminates §1981 from the "arsenal of weapons" available to combat racial harassment in the workplace. That decision is contrary to congressional intent, the decisions of this Court, and the decisions of other federal courts. Moreover, the elimination of §1981 as a remedy against racial harassment in the workplace clearly conflicts with the national policy of eradicating racial discrimination, and will seriously hamper efforts to eliminate racial harassment in the workplace.

In his separate concurring opinion in Runyon v. McCrary, Justice Stevens wrote:

> [E]ven if [the Court's decision in Jones v. Alfred H. Mayer Co.] did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today.
>
> The policy of the Nation as formulated by the Congress in

> recent years has moved constantly in the direction of eliminating racial segregation in all sectors of society. This Court has given a liberal construction to such legislation. For the Court now to overrule Jones would be a significant step backwards . . . Such a step would be so clearly contrary to my understanding of the mores of today that I think the Court is entirely correct in adhering to Jones.

Runyon, supra, 427 U.S. 160, 191 (1976)(Stevens, J., concurring).

Justice Stevens' observation that Congress has endeavored, through legislation, to eliminate race discrimination throughout our society remains true today.20/ This Court has similarly continued to "give[] a

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20/ See e.g., Pub. L. No. 97-205, 96 Stat. 134 (June 29, 1982)(amendments expanding coverage of the Voting Rights Act of 1965); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (November 6, 1986)(creating new remedy for employment discrimination on the basis of national origin or citizenship).

sympathetic and liberal construction" to Congress' antidiscrimination legislation, particularly the modern derivatives of the Civil Rights Act of 1866, 42 U.S.C. §§1981 and 1982.21/

The decision below retreats significantly from this legislative commitment to the eradication of race discrimination and runs counter to prevailing judicial support for legislative initiatives to achieve greater racial justice in this society.

For many persons in the workforce, the principles of equal employment opportunity

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21/ See e.g., Saint Francis College v. Al-Khazraji, 481 U.S. __, 95 L.Ed.2d 582 (1987)(applying §1981 to Arab's employment discrimination claim); Shaare Tefila Congregation v. Cobb, 481 U.S. ___, 95 L.Ed.2d 594 (1987)(applying §1982 to case involving vandalism of a synagogue); Goodman v. Lukens Steel Co., 482 U.S. ___, 96 L.Ed.2d 572 (1987)(applying §1981 in case involving allegation of union acquiescence in discriminatory acts, including racial harassment).

are still aspirational. Racial harassment in the workplace is one of the lingering impediments to the achievement of equal employment opportunity.22/

Racial harassment in the workplace is sometimes characterized by intransigent resistance to compliance with the antidiscrimination laws.23/ Occasionally

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22/ A case before the Michigan Civil Rights Commission, Ben Citchen v. Firestone Steel Products Co., Nos. 12190-EM, 15389-EM (Michigan Civil Rights Commission 1984) is illustrative of an extreme case of racial harassment. The black complainant in that case was subjected to racial epithets, was physically segregated from white employees, and received notes containing references to the "KKK." See M. Denis, "Race Harassment Discrimination: A Problem That Won't Go Away?" 10 Empl. Rel. L.J. 415 - 36. According to Denis, Citchen also found "a noose . . . [and] a sign that read[] 'KKK for you, Ben,'" at his work station and discovered "a dead mouse, fishbones, and a cross soaked in kerosene burning in his locker." Denis, id. at 415-16. The author concludes that "Citchen is the egregious case. But in some respects it is not really an aberration. Racial harassment still exists," id. at 435.

23/ See, e.g., Claiborne v. Illinois Central
(continued...)

racial harassment is manifested through conduct which can only be described as egregious.24/ Finally, in some instances

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23/ (...continued)
R.R., 583 F.2d 143, 154 (5th Cir. 1978), cert. denied, 442 U.S. 934 (1979)(affirming trial court's award of $50,000 in punitive damages in Title VII and §1981 action on ground that "[t]he railroad's intransigence in failing . . . to redress any of its prior discriminatory acts, plus its additional acts of post [1964 Civil Rights] Act discrimination, such as testing only black helpers to evaluate their asserted 'deficiencies,' supports the [trial] court's view that the defendant acted with malice with respect to its black employees.").

24/ See e.g., Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981). In Taylor, the court of appeals affirmed a trial court's award of relief under 42 U.S.C. §1981 to a victim of racial harassment. The appeals court held that "ample evidence in the record . . . support[ed] the district court's finding that the racial atmosphere of [plaintiff's workplace] was 'dismal,'" and characterized the conditions existing in the worksite of plaintiff's former employer as a "pervasive atmosphere of prejudice." 653 F.2d 1193, 1199. The appeals court "recite[d] some of the overwhelming evidence relating to the 'dismal' racial atmosphere" in plaintiff's former place of employment, including evidence that racial slurs and epithets were frequently used in the workplace; testimony about an incident in which an employee notorious for his claimed affiliation with the Ku Klux Klan displayed a noose in the supply room; evidence that the
(continued...)

racial harassment involves repeated interference with opportunities for advancement, or other, more subtle manifestations of racial animus.25/

24/ (...continued)
physically demanding position of mail clerk was filled almost exclusively by black employees; and testimony from the plaintiff that "racially offensive jokes" were told in her presence during her employment with defendant. Id., at 1198-99. See also Hunter v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986)(plaintiff subjected to, inter alia, racial epithets, derogatory graffiti, and coworkers tampering with his equipment awarded punitive and compensatory damages in Title VII and §1981 action).

25/ For example, in Williamson v. Handy Button Machine Co., 817 F.2d 1290 (7th Cir. 1987) the court affirmed an award of punitive and compensatory damages to Title VII and §1981 plaintiff who was repeatedly denied promotions, and witnessed white employees with less seniority promoted above her over the course of eight years. After plaintiff filed a charge of discrimination with the EEOC, her supervisor placed a document in plaintiff's personnel file regarding her use of vacation time. Subsequently, plaintiff's supervisor "berated" her for using a particular washroom facility, and plaintiff suffered a nervous breakdown shortly after this confrontation. 817 F.2d 1290, 1292-93. The court of appeals observed that "none of these events involved racial epithets, and the employer offered neutral

(continued...)

Nevertheless racial harassment --- whether sophisticated or crude--- impedes the achievement of equal employment opportunity.26/ It is important to

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25/ (...continued)
explanations for each. But once a jury decides that an employer makes use of race in its everyday decisions — in this case, that it held Williamson's race against her over a decade — it is permissible to infer that race also explains other disparate treatment." 817 F.2d at 1295.

26/ In McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975) the court wrote:

> Section 1981 doubtless was intended to give the former slaves access to opportunities for material betterment of themselves, but it was also intended to remove the stigma which accompanied the disabilities under which they had formerly labored. The plain command of the statute is that those enslaved henceforth shall be treated as having all of the rights and dignity of other people dwelling with them in a land of freedom. A denial of these statutory rights is treatment of the victim as being subject to those earlier disabilities. It is an affront, of which embarrassment and humiliation are natural consequences.

515 F.2d 1082, 1089, aff'd Runyon v. McCrary, 427 U.S. 160 (1976).

(continued...)

preserve a broad range of remedies to address this persistent and troubling phenomenon.

In appropriate cases, the remedies and procedures available under 42 U.S.C. §1981[27/] are a valuable means of

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26/ (...continued)
Assessment of a racial harassment claim necessarily involves the exercise of discretion by the trier of fact. However, it is important, as many lower courts have recognized, to be sensitive to forms of employment discrimination which, while more subtle than the behavior recounted in cases such as Taylor, supra, nevertheless constitute "treatment of the victim as being subject to th[e] . . . disabilities [of slavery]." McCrary, id. See e.g., Lowery v. WMC-TV, 658 F.Supp. 1240 (W.D. Tenn. 1987), vacated on other grounds, 661 F.Supp. 65 (W.D. Tenn. 1987).

27/ This Court has observed that "[t]he remedies available under Title VII of the Civil Rights Act of 1964 and under Section 1981 . . . augment each other and are not mutually exclusive." Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975). Compensatory and punitive damages, as well as equitable remedies, are available to a prevailing §1981 plaintiff. Id. at 460. In addition, the lower court have allowed jury trials in §1981 actions since legal as well as equitable remedies are available in such actions. Cf. Curtis v. Loether, 415 U.S. 189 (1974)(holding that jury (continued...)

providing complete relief to victims of racial harassment and deterring the degrading and debilitating phenomenon of racial harassment in the workplace.

The decision below shrinks the "arsenal of weapons" available to combat racial harassment in the workplace. In light of the legislative history, judicial decisions, and public policy which squarely conflict with this result, the decision below should be reversed by this Court.

27/ (...continued)
trial is available in 42 U.S.C. §1982 actions). See generally Comment, "Developments in the Law - Section 1981," 15 Harv.Civ.R.-Civ.L.L.Rev. at 246-50.

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be reversed and the case remanded for a new trial.

Respectfully submitted,

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